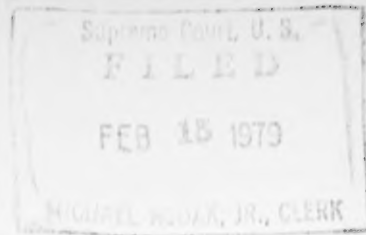


No. 78-1035



In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM M. PACE, PETITIONER

v.

DEPARTMENT OF THE TREASURY

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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**MEMORANDUM FOR THE RESPONDENT
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Petitioner, formerly a GS-11 agent of the Bureau of Alcohol, Tobacco and Firearms (BATF), seeks reclassification as a GS-12. Purporting to represent a class composed of all GS-11 BATF agents, petitioner contends that all BATF agents perform essentially the same work and therefore must be assigned to the same civil service grade. Petitioner also argues that he and the other class members are entitled to reclassification because employees of other federal criminal investigative agencies doing substantially the same work are classified in a grade higher than GS-11.

1. In November 1974 petitioner requested the Civil Service Commission to reclassify him (and 30 other BATF agents whom he represented) to GS-12 positions

(Pet. App. A-4).¹ After initially indicating that the requests would be handled by its Washington office, the Commission advised petitioner, and the agents he represented, that each agent should complete a questionnaire about his work and that each questionnaire would then be evaluated by the appropriate regional office. Petitioner objected to this procedure and chose to treat the instruction as an "adverse decision." He refused to provide the requested information to the Commission and advised the other agents not to cooperate. The Commission informed petitioner that it had not rejected his claim but was merely attempting to develop the factual record necessary to enable the agency to rule on the reclassification requests. Petitioner nonetheless persisted in his interpretation of the Commission's action and filed this suit in the United States District Court for the Northern District of Mississippi seeking review of the Commission's "decision."

The district court referred the case to a magistrate, who recommended that the suit be dismissed because "[t]he uncontradicted facts establish that [petitioner] has failed to exhaust administrative remedies and that no good cause exists for excusing that failure" (Pet. App. A-18). The magistrate also observed that petitioner retired from his BATF employment while this action was pending in the district court (*id.* at A-7). Accordingly, the magistrate stated that petitioner's personal claim is moot and that he cannot proceed as a class representative because he is no longer a member of the class seeking reclassification (*id.* at A-7 to A-8). The magistrate made no recommendation concerning the substitution of another class member as class representative, because he found that the Commission had not made a final decision with respect to any

¹The number of agents represented by petitioner subsequently grew to 77 (Pet. App. A-4). Because of its disposition of the case, the district court did not need to determine whether to certify petitioner's suit as a class action (*id.* at A-19).

class member and therefore that no class member had exhausted his administrative remedies (*id.* at A-9). The district court adopted the magistrate's report and recommendation (*id.* at A-20), and the court of appeals affirmed (*id.* at A-22).

2. Petitioner contends (Pet. 5-6) that the procedure chosen by the Commission for evaluating his reclassification request and the similar requests of other BATF agents will result in a failure to consider the correctness of existing classifications by reference to the classification of comparable positions in other federal law enforcement agencies. Petitioner argues that *Haneke v. Secretary of HEW*, 535 F. 2d 1291 (D.C. Cir. 1976), requires the Commission to conduct such comparisons and not to decide reclassification requests simply by reference to Commission-established standards for particular grade levels. The district court correctly concluded, however, that the Commission's request for information concerning the individual class members' jobs was reasonable and that petitioner's disagreement with the Commission's approach can not excuse his failure to await an administrative disposition of his claim before resorting to judicial review (Pet. App. A-14 to A-15).

Petitioner himself has retired and is not entitled to either reclassification or back pay. *United States v. Testan*, 424 U.S. 392 (1976). Petitioner's claim is moot, and he is not a proper class representative because he is no longer a member of the class he seeks to represent. *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977). If a proper class representative pursues his request for reclassification and obtains a final decision from the Commission, the Commission's method of processing and evaluating such requests can be challenged on judicial review of the agency's decision. Until then, judicial review is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1979